Petition

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No. 81-175

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

GENE THOMAS MEYER

Petitioner

v.

STATE OF MARYLAND

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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QUESTION PRESENTED

Did the trial judge violate Petitioner's Right Against Double Jeopardy in imposing four convictions four (4) consecutive twenty (20) year sentences upon the Petitioner where the criminal act of the Petitioner was one continuous conversation wherein he made the solicitation.

TABLE OF CONTENTS

Cases:	Page
QUESTION PRESENTED	i
JURISDICTION	1
STATEMENT OF THE CASE	2
CONSTITUTIONAL PROVISION	3
STATEMENT OF FACTS	3
ARGUMENT:	5
The State Trial Judge Violated Petitioner's Right Against Double Jeopardy In Imposing Four Convictions And Four (4) Consecutive Twenty (20) Year Sentences Upon The Petitioner Where The Criminal Act Of The Petitioner Was One Continuous Conversation Wherein He Made The Solicitation	5
CONCLUSION	12

APPENDIX

Comments of the Trial Judge in Imposing Sentence Against Appellant	1a
Petition for Writ of Certiorari, Docket 699	2a
Opinion of the Court of Special Appeals of Maryland, No. 699, September Term, 1980	16a
Order of the Court of Appeals of Maryland denying Petitioner's Petition for Writ of Certiorari dated May 27, 1981	31a

TABLE OF CITATIONS

Cases: **Page**

Barlett v. United States,
166 F.2d 928 10

Braverman v. United States,
317 U.S. 49 (1942) 8, 9, 11

Cherry v. State,
18 Md. App. 660 (1975) 7, 9, 11

Cousins v. State,
277 Md. 383 (1976) 5, 6

Feriacane v. United States,
29 F.2d 691, 692 (7th Cir. 1928) 10

Gilpin v. State,
142 Md. 464, 121 A. 354 (1923) 5

Lamb v. State,
67 Md. 524 (1921) 7, 11

Lockburger v. United States,
284 U.S. 299, 52 S. Ct. 180, 76
L. Ed. 306 (1932) 6

Morgan v. Devine,
237 U.S. 632, 641, 35 S. Ct. 712,
59 L. Ed. 1153 (1915) 6

North Carolina v. Pearce,
395 U.S. 711, 89 S. Ct. 2072,
23 L. Ed. 2d 656 (1969) 5

Parker v. State,
7 Md. App. 167, 195, 199, 254 A. 2d
381 (1969) 7

Price v. State,
261 Md. 573 (1971) 6

Short v. United States,
(C.C.A. 4th) 91 F. 2d 614, 112 lar 969 ..... 8, 9, 11

Smith v. State,
23 Md. App. 177 (1974) 7

Thomas v. State,
277 Md. 257, 353 A. 2d 240 (1976) 5

Miscellaneous:

Columbia L. Rev., Vol. 621 p. 995 (1961) 10

15 Am. Jr. "Criminal Law" Sec. 382 8

24 Minn. L. Rev. 522 10

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STATEMENT OF JURISIDICTION

The grounds on which the jurisdiction of this court is invoked are that the multiple conviction and consecutive sentences imposed upon the Petitioner by the Circuit Court of Prince Georges County, Maryland violate his Fifth Amendment right against double jeopardy guaranteed to him under the United States Constitution.

The Petitioner was sentenced on April 18, 1980 and the judgment of the lower court was affirmed by the Court of Special Appeals of Maryland on February 6, 1981. The Court of Appeals of Maryland denied Petitioner's Petition for Writ of Certiorari on May 27, 1981.

STATEMENT OF THE CASE

The Petitioner Gene Thomas Meyer, was served by the State's Attorney for Prince George's County, Maryland, with a criminal information (Criminal Number 19767) charging him with four (4) counts of the common law crime of solicitation of murder. Each count was identical. with the exception of the name of the intended victim. Each count charged that the Petitioner solicited Frank Mazzone, a/k/a Vince Rinaldo, to murder each intended victim. The Petitioner pled not guilty to the information and a jury trial commenced April 16, 1980, resulting in jury verdict of guilty on each count on April 18, 1980. The trial judge sentenced the Petitioner that same day to incarceration for a period of twenty (20) years on each separate count, service of each sentence to be consecutive with the remaining sentences. [T.377-379]. From the conviction of the Petitioner of each count of the information and this sentence he entered an appeal to the Court of Special Appeals.

In a reported opinion, *Meyer v. State*, No. 699, September Term, 1980, filed February 6, 1981, the Court of Special Appeals of Maryland affirmed. The Petitioner filed a timely Petition for Writ of Certiorari to the Court of Appeals of Maryland (Petition Docket No. 694), but this Petition was denied by an Order dated May 27, 1981. All State Court appeals having been exhausted, this Petition is filed.

The federal question sought to be reviewed here was raised first in Petitioner's Appellant's Brief filed with the Court of Special Appeals and was raised again in the Petitioner's Petition for Writ of Certiorari to the Court of Appeals of Maryland. The issue raised here was discussed by the Court of Special Appeals on pages 3 through 13 of the slip opinion. (See Appendix)

The argument raising the issue of multiple convictions and punishments was originally raised by the Petitioner as part of a motion for judgment of acquittal at trial at the conclusion of the State's case and after all the evidence was presented.

CONSTITUTIONAL PROVISION

[AMENDMENT V]
[Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF FACTS

After having been convicted of and awaiting sentence for the murder of Lon Alec Lewis' wife and child in the Prince George's County Detention Center, the Petitioner requested of a prisoner in an adjoining cell, Walker, that he arrange for a meeting between himself and an attorney for an organization of people who would commit contract killings. [T.117-118, 126]. The local police, having received this information from Walker, the prisoner, and in conjunction with the Office of the State's Attorney for Prince George's County, Maryland, arranged for Captain Frank Mazzone of the Maryland State Police to visit the Petitioner. At this meeting Mazzone, pretending to be Vincent

Rinaldo, attorney for an organization of hit men, carried a hidden microphone for the purpose of recording the conversation for use as evidence at trial. [T.244-258]. This conversation occurred on May 8, 1978, and on May 15, 1978, and the taped recordings of this conversation was admitted into evidence and played to the jury. [T.263-266, 271 291]. Mazzone knew during these conversations that the Petitioner was expecting to see and was assuming that he was a legal representative of the hit men, although Mazzone was careful not to say that he was an attorney. [T.255-256].

The text of the conversations appear in the record in the form of transcripts admitted into evidence and given to the jury to read as they had heard the tapes themselves. [T.263-266, 268, 276-277]. It was in the course of these conversations that the Petitioner requested Mazzone to make arrangements to have his wife, Hortensia Meyer, his co-conspirator in the case upon which he was awaiting sentencing, Lon Alec Lewis, and the two (2) police officers involved in that case, David Hatfield and Michael Morrissette, murdered.

After the conversation of May 15, 1978, Mazzone never returned to see the Petitioner and the indictment in Criminal Number 19268 and the information in Criminal Number 19767 charging the Petitioner with soliciting Mazzone to commit the murders followed.

ARGUMENT

THE STATE TRIAL JUDGE VIOLATED PETITIONER'S RIGHT AGAINST DOUBLE JEOPARDY BY ADJUDGING FOUR CONVICTIONS AND IN IMPOSING FOUR (4) CONSECUTIVE TWENTY (20) YEAR SENTENCES UPON THE PETITIONER WHERE THE CRIMINAL ACT OF THE PETITIONER WAS ONE CONVERSATION WHEREIN HE MADE THE SOLICITATION.

In this case, the trial judge imposed four convictions of (4) consecutive twenty (20) year sentences upon the Petitioner Pursuant to his conviction on each count of the criminal information and made all sentences consecutive with each other and with sentences received in the prior conviction of the Petitioner. This was a violation of his right against double jeopardy guaranteed to him under the Fifth Amendment ot the United States Constitution under the circumstances of this case for the reason that the criminal act of the Petitioner was accomplished in one conversation occurring over two days wherein he solicited Mazzone to have the murders committed.

The primary authority in Maryland dealing with the Fifth Amendment prohibition against double jeopardy, as well as with the common law prohibition, as applied to multiple punishments for the same offense, is *Cousins v. State*, 277 Md. 383 (1976). The Court stated that the prohibition against double jeopardy, both under the Fifth Amendment and at common law, bars successive trials as well as multiple punishments for the same offense. *Thomas v. State*, 277 Md. 257, 353 A. 2d 240 (1976); *Gilpin v. State*, 142 Md. 464, 121 A. 354 (1923); *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed.

2d 656 (1969). It was pointed out that Maryland lacks a constitutional or statutory double jeopardy prohibition, and is therefore bound to the applications and interpretations of those provisions by the Supreme Court of the United States. Those decisions set forth the *"required evidence" test* as a standard for determining whether different statutory offenses are to be deemed the same for double jeopardy purposes. *That test is that if each offense requires proof of a fact which the other does not, neither multiple prosecutions nor multiple punishments are barred* by the prohibition against double jeopardy even though each offense may arise from the same act or criminal episode. Only where one offense requires proof of a fact not required by the other, or where neither offense requires proof of an additional fact, are the offenses deemed the same for double jeopardy purposes, with successive prosecutions and multiple punishments being prohibited. *Lockburger v. United States,* 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). The opinion in *Cousins* stated that although a few States have adopted the same transaction standard as a matter of State law, it has not been applied as a federal constitutional requirement. *Morgan v. Devine,* 237 U.S. 632, 641, 35 S. Ct. 712, 59 L. Ed. 1153 (1915). In rejecting the same transaction test, the Court held itself bound to the Supreme Court decisions applying the Fifth Amendment in the absence of a State constitutional or statutory double jeopardy provision. Other States, where the "same transaction" test has been adopted, have their own such provisions.

The doctrine of "merger", which is the corollary to the "required evidence" test, was set forth in *Price v. State,* 261 Md. 573 (1971). In that case the Petitioner posed the question as to whether his arson conviction should merge into his conviction for felony murder, both arising out of

the same transaction. The Court stated that the modern test generally applied in Maryland to the question of merger of offenses is whether one crime necessarily involves the other. *Parker v. State*, 7 Md. App. 167, 195, 199, 254 A. 2d 381 (1969). In holding that the doctrine of merger did not prevent separate convictions for felony murder and the underlying felony of arson, the Court opined that in order for there to have been a merger of the two crimes, there would had to have been a single, indivisible criminal act in which the elements essential to the proof of the greater offense necessarily included those required to establish the lesser offense. In this case the Court found decisive the fact that there was more than one victim affected by the Petitioner's single criminal act of throwing a bucket of gasoline on a burning building, pointing out that where the same general transaction affects different victims, the offenses would not merge. And again, in *Smith v. State*, 23 Md. App. 177 (1974) the Court, where the Appellants had assaulted and robbed some 26 persons, found no merger of offenses because each of the crimes of which the Petitioners were found guilty was committed against a different victim. The Court stated that the offenses were separate and distinct because none necessarily involved the others; the facts necessary to the proof of one offense were not essential ingredients to the proof of the other. In none of the decisions of this State nor in the Federal Judicial System are these principles applied to the common law crime of solicitation under consideration here.

Apparently, Maryland has considered the crime of solicitation in only two reported decisions. *Cherry v. State*, 18 Md. App. 252 (1973); *Lamb v. State*, 67 Md. 524 (1921). In reviewing the elements of the common law misdemeanor of solicitation, the Court in *Cherry* stated

that the act forbidden consists of the accused person's parole or written efforts to activate another to commit a criminal offense. *Solicitation is an act and the gist of this offense is incitement. No proof of an act toward the commission of the intended felony is required, as would be for a conviction of the crime of attempt or conspiracy,* since the crime of solicitation is complete upon proof of the verbal act of incitement by the defendant to another to commit what is required in Maryland to be a felony. At such, none of the decisions cited above applying the prohibition against double jeopardy are applicable to the case sub judice. What the State of Maryland has done in the instant case is to divide a single offense into four offenses and impose four punishments for one and the same act. By analogy, it is the same as though in a larceny for stealing several articles of property at the same time, a prosecution was brought for the theft of each individual article in a separate count. And again, it would be analogous to a situation, where several forged instruments are uttered at the same time and by the same act, convictions were obtained by the prosecution on separate counts for each instrument uttered and consecutive punishments imposed. A collection of cases arising in numerous States supporting this view can be found in 15 *Am. Jr.* "Criminal Law" Sec. 382.

Similarly, it was held in *Short v. United States* (C.C.A. 4th) 91 F. 2d 614, 112 A.L.R. 969 that there could be only lawful prosecution where the acts charged are all included within one conspiracy. The Supreme Court in *Braverman v. United States,* 317 U.S. 49 (1942) took certiorari where the question was raised as to whether convictions on several counts of an indictment, each charging conspiracy to violate a different provision of the Internal Revenue Laws, where the jury verdict was supported by evidence of

but a single conspiracy, would sustain a sentence of consecutive two year terms on each count. There the maximum penalty for a single violation of the conspirary statute was two years imprisonment. As in *Cherry* supra, the Court stated that the gist of the crime of conspiracy is the agreement of the conspirators to commit one or more unlawful acts where one or more of such parties do any act to effect the object of the conspiracy. The Court granted certiorari to resolve a conflict of decisions, including the *Short* case. (See footnote to page 52) In reversing the lower court, the Court in *Braverman* rejected the government's position that even though a single agreement was entered into, the conspirators were guilty of as many offenses as the agreement had criminal objects. *The key factor in this decision was the nature of the crime of conspiracy as being the agreement of the conspirators to commit one or more unlawful acts.* The court opined that whether the object of a single agreement is to commit one or many crimes, it is in either case *that agreement* which constitutes the conspiracy which the statute (reflecting the common law) punishes. In holding that for such a violation, only the single penalty prescribed by that statute could be imposed, the Court struck down the sentence of the trial court of consecutive two year terms.

The counts in the present case alleged common law solicitation and not statutory solicitation. However, the cases which deal with this issue in the context of statutory solicitation indicate that the common law definition of solicitation is applied. In solicitation, the gist of the offense is the incitement. The incitement extended during two separate occasions, on May 8, 1978 and on May 15, 1978, necessitated by Mazzone's cutting off the conversation and arranging for a continuation of that conversation a week later. The "required evidence" test generally used in deal-

ing with multiple punishment results is particularly inappropriate to a solicitation charge, since the State can easily overcome the test by alleging different combinations of participants, dates, and successive or subsequent indictments for essentially the same solicitation activity. See *Barlett v. United States,* 166 F.2d 928; *Feriacane v. United States,* 29 F.2d 691, 692 (7th Cir. 1928); 24 *Minn. L.* Rev. *522;* 522; *Columbia L. Rev.,* Vol. 621 p. 995 (1961). To follow the State's logic, it could have multiplied the four counts by two and imposed eight consecutive twenty year sentences by adding a separate count for each conversation, one on May 8 and one on May 15, 1978, and for each of the four victims. Separate counts and separate punishments would only have been justifiable in this case if the Petitioner had solicited other persons beside Mazzone to commit the felony of murder. To convict of the crime of solicitation, the State need only prove through the words used by the Petitioner that the intended crime was a felony. It need not have shown the identity of the intended victim of the felony. For this reason, the traditional required evidence test could not justify separate counts and separate consecutive punishments under the circumstances of this case. To accept the State's position, as was done by the trial judge, that separate consecutive punishments could be imposed based on the identity of the intended victims of the solicited felony would lead to an absurd result if, where the evidence established at that a defendant had solicited another to blow up New York City with a nuclear bomb, consecutive twenty year sentences were to be imposed for each person in New York City through the vehicle of an indictment adopting by reference the telephone book of the greater metropolitan New York City area.

More importantly, the evidence supported only the existence of one crime, solicitation, regardless of the number

of intended victims. This is so because, under the common law, the gist of the offense of solicitation is the act of incitement. *Cherry*, supra; *Lamb*, supra. The situation is directly analagous to the crime of conspirary dealt with by *Braverman*. However, multiple convictions of the Petitioner under the circumstances of this case is an even clearer imposition of double jeopardy because, unlike the crimes of conspiracy and attempt which require an act in furtherance of the unlawful agreement or intent, one may be found guilty of the common law crime of solicitation upon evidence of the incitement or conversation only, with no proof of an affirmative act toward the solicited offense necessary.

Here the Court of Special Appeals of Maryland has decided a federal question of substance not heretofore determined by this Court namely, that the Fifth Amendment to the United States Constitution does not bar multiple convictions and multiple sentences for solicitation to commit murder where there was but one solicitor, one solicitee, one continuous conversation, and four intended victims, all of whose demise was sought by the Petitioner because of their role in his initial conviction for murder. The possible differences in the times, places and means of execution of the intended victims do not make one solicitation into four solicitations where the gist of the offense is the act of incitement issuing from the Petitioner's mouth, as was the opinion of the Court of Special Appeals. This decision conflicts with *Short*, supra, *Braverman*, supra, in its reasoning and is the first reported decision addressed to this issue in the Anglo-American common law system

For these reasons, the trial judge should have imposed a single twenty year sentence upon the Petitioner or should have made all four sentences concurrent with one another

in order to avoid imposing multiple punishments on the Petitioner in violation of his Fifth Amendment right against the imposition of double jeopardy.

CONCLUSION

For the reasons stated above, the Petitioner respectfully requests that this Court issue a Writ of Certiorari to the Court of Special Appeals of Maryland and reduce the judgment and sentence of the lower court to the maximum permissible sentence of twenty years on the four counts of the criminal information.

Respectfully submitted,

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APPENDIX A

[377] THE COURT: Mr. Meyer, this probably the most unfathomable set of circumstances I can ever imagine. Up until a few years ago, you had absolutely no prior record. Apparently you were well thought of in your home town. You had loving parents and certainly a fine family. Inside of a short period of time not only have you committed a number of acts but I cannot imagine anything more vicious and depraved, and I cannot imagine a more aggravated set of circumstances than a person who has already been convicted on two murders and is awaiting sentence on two murders at a time when you would expect at least the highest degree of contrition that anybody would ever show to during that period of time attempt to hire someone to commit four additional murders.

[378] Regardless of what your prior background was, I have got to consider the enormity of these crimes. They are separate and distinct crimes from each other, and they are certainly distinct from the two murders that you were awaiting sentence on at the time they were committed, and, accordingly, I feel that the sentence should be separate and distinct.

On count number one, the sentence is 20 years under the Division of Corrections of the Department of Public Safety and Correctional Services. On count two, the sentence is 20 years under the Division of Corrections of the Department of Public Safety and Correctional Services. On count three, 20 years under the Division of Corrections of the Department of Public Safety and Correctional Services. On count four, 20 years under the Division of Corrections of the Department of Public Safety and Correctional Services.

Those sentences will be consecutive with each other and consecutive with the two sentences in 18,621.

APPENDIX B

IN THE
COURT OF APPEALS OF MARYLAND

GENE THOMAS MEYER *Petitioner-Appellant*	:	
	:	Court of Special Appeals
vs.	:	Docket N. 699
	:	
STATE OF MARYLAND *Respondent-Appellee*	:	

PETITION FOR WRIT OF CERTIORARI

Gene Thomas Meyer, by and through his attorneys JOHN T. BELL and BELL, CORNELIUS & SHORE, respectfully requests that this Court issue a Writ of Certiorari to review the reported decision of the Court of Special Appeals (Number 699, September Term 1980) filed on February 6, 1981. A copy of the opinion of the Court of Special Appeals, by Wilner, J., is appended.

QUESTIONS PRESENTED FOR REVIEW

1. Was the Appellant unjustly and unlawfully convicted of solicitation to commit murder where the evidence indicated that the Appellant solicited Mazzone not to murder the intended victim as charged but rather to solicit others to carry out the intended murder and where the transcripts of the conversations between the two indicated that the police officer was inciting the Appellant to solicit him, in return?

2. Was it a violation of the right not to be placed in double jeopardy for the Court to impose four (4) consecutive twenty (20) year sentences upon the Appellant where the alleged criminal act of the Appellant was one continuous conversation wherein he made the solicitations?

STATEMENT OF THE CASE

Petitioner-Appellant, Gene T. Meyer, while awaiting sentencing for his convictions for the first degree murder of Carol Lewis and the second degree murder of Heather Lewis, asked a fellow prisoner whether he knew of anyone who would contract to commit murder. Following an affirmative response, Meyer requested that a meeting be arranged with that person. This fellow prisoner communicated Meyer's request to the local police and the police, in conjunction with the Office of the State's Attorney for Prince George's County, Maryland, arranged for a Maryland State Police officer, Captain Frank Mazzone, to meet with Meyer in the guise of a representative for an organization of "hit men". Two meetings occurred, on May 8, 1978 and May 15, 1978, and both were recorded by means of a transmitter carried by Mazzone.

During the course of these two meetings Captain Mazzone was persistent in inviting Meyer to repeat to him what Mazzone knew to be Meyer's understanding of the purpose of the meeting, namely, to make arrangements for the murder of Meyer's wife, Hortensia Meyer, his coconspirator in the case for which he was awaiting sentencing, Lon Alec Lewis, who had contracted with Meyer to have each of their wives murdered by the other, and two police officers, David Hatfield and Michael Morrissette, who were prosecution witnesses in Meyer's trial for murder. The indictment in Criminal Number 19268 and the information in Criminal Number 19767 charging Meyer with four (4) counts of the common law crime of solicitation of murder followed and Meyer was convicted by jury verdict on each count on April 18, 1980.

Shortly after introducing himself, Mazzone made the following inquiry:

Frank: All right Gene I don't want to uh spend too much time in here, but uh Joe tells me you might have need for uh service and uh I guess uh the first thing to talk about is and uh get together on the fee.

Gene: Uh huh.

Frank: And uh the point is to give me an idea your (a) What you like done:? (B) What a what fee your talking about? and uh then we go from there.

(Transcript of Conversation of 5/8/78, p.3, Exhibit 8B)

A few minutes later, the following colloquy occurred concerning prospective victims in addition to Meyer's wife:

Gene: The insurance policy the police have got that but Sam Stanlont is the insurance man who sold the policy personal friend, otherwise I wouldn't even bought the damn thing. There are a few things that a that if it comes true one might be using your services again if it feasible. Few other things.

Frank: For what – maybe there's some quick money there.

Gene: I mean me paying for you services, it a cop but, I don't want to get into that, you know.

Frank: We get something special on that.

Gene: Yeah, Yeah, right.

Frank: But ah which one's that? One of one's in this outfit.

Gene: Detective.

Frank: What, what we got in mind, what we got to benefit on that one?

Gene: Just paying the services.

Frank: When would we do that one?

Gene: Well, we don't want to get into that until the insurance pays off – otherwise I won't have anything to deal with you people.

Frank: Yeah, he's a cop here somewhere.

Gene: Yeah, in P.G. County.

Frank: What's his number?

(Transcript of Conversation of 5/8/78, p. 19 Exhibit 8B)

During the second conversation, the following remarks were made concerning Leon Alec Lewis:

Frank: Yeah all right, what else. You take a lot of notes?

Gene: I can't read it though.

Frank: You don't have my name on there, do you? Well, you got my name over there, so I guess it won't make any difference.

Gene: No, this is the only thing I got – that you wrote – yeah thats your name on it. That the only thing I got, that was on there. Oh yea, um the ah, it may not be advisable and that's strictly on your advice if its advisable or not the ah the other guy, he's here now.

Frank: Have who?

Gene: The other guy

Frank: The guy a?

Gene: Yea

Frank: In your case?

Gene: Yea. Maybe if his trial is coming up pretty soon, they'll of letting him do his thing or whatever, but ah, if he walks, I doubt if he going to walk because too damn vicious.

Frank: So what you, what you want to do to him?

Gene: Ah, if I, if I woulda known, now its too late, but if I would known falling apart, it would have been taken care of before this by myself. But the, he'll probably be going to Baltimore City or wherever, I don't know.

Frank: What you mean for trial?

Gene: No, I mean he will be going across the street here for trial.

Frank: What you mean he'll be going to Baltimore?

Gene: Put when he goes to jail.

Frank: All right, what you want to do with him?

Gene: Um, same thing with Hatfield or Morrisette if that's

Frank: Is he is he on the street right now

Gene: No, he's up here – second floor _____

Frank: Does he know you're here?

Gene: Disappears or if he dies, people collect _____ people ask too many questions here.

Frank: You, do you want him dead, or you don't.

Gene: I do

Frank: You do

(Transcript of conversation of 5/15/78, p. 22, Exhibit 10B)

ARGUMENT

I

It was error for the Court of Special Appeals to have held that the Petitioner's words amounted to anything other than to solicit the solicitation of murder. The Court of Special Appeals held that the object of Meyer's solicitation was for Mazzone to commit murder. This holding relies upon the culpability of Mazzone as a principal if the murders were in fact committed by reason of his efforts. This degree of culpability would arise whether Mazzone was an actual participant or an accessory before the fact. But there were no murders; had there been killings as a result of the Petitioner's solicitations, Meyer himself would have been an accessory before the fact and thereby culpable as a principal. Petitioner's solicitation of Mazzone, had it actually led to the commission of murder, would have made them both culpable as accessories before the fact. But Meyer's solicitations did not have its intended effect; given that Mazzone was a police officer, it was impossible for the solicitation to persuade.

Petitioner's effort to engage Mazzone in order that the latter engage third parties to commit murder, because the effort failed, is the solicitation of a solicitation. To hold that Meyer's effort to engage Mazzone was a solicitation of Mazzone to aid and abet murder is to obliterate the difference between the status of a solicitor of a crime and the status of an accessory before the fact. Petitioner sought to

accomplish specific crimes by soliciting another to solicit the commission of those crimes. Because there was neither a murder nor any steps taken toward the end of committing murder, other than the solicitation, Meyer did not abet the commission of a murder; he merely solicited. Similarly, for Mazzone there was neither a murder nor any steps taken toward the end of soliciting another to commit murder; Mazzone was solicited to solicit but declined the incitement.

It is possible for a person to urge another to urge still a third person to commit a crime. If the crime is committed the first and second parties are accessories before the fact. If the crime is not committed because the third party does not respond to the urging, the second party can be nonetheless guilty of solicitation. The second party has not aided or abetted the commission of a crime; he has simply solicited, i.e. attempted to incite, the third party to commit a crime. The first party, if he is guilty of anything, is guilty of the solicitation of a solicitation. But if the crime of solicitation is a misdemeanor, the first party can be charged only with the solicitation of a misdemeanor. And if solicitation, as a crime, is limited to those instances where the object of the solicitation is a felony, then the first party cannot be charged with a crime.

Since the gist of the offense of solicitation is the incitement, there can be no crime of solicitation attributed to the first party where there is no communication between the first party and the third party, who is to carry out the crime. The connection is simply too remote.

The interpretation of the Court of Special Appeals of the words of Meyer as they appear in the transcript to the effect that he solicited Mazzone to commit the murders is simply incorrect, since the words spoken which gave rise to this inference came from Mazzone not Meyer, and since

Meyer assumed that Mazzone was the attorney for the crime organization, and not a gun man himself. If the gist of the offense is the incitement, and the incitement, or words spoken suggesting the commission of a crime, came primarily from Mazzone, Meyer should not have been convicted of solicitation. Where is the danger to society under these circumstances where a police officer is milking by trick the incriminating words out of the Defendant, where the gist of the offense is the incitement? This is not to say that Meyer could not have been convicted for words spoken to another prisoner, where the words were not solicited by that person, as they were here by Mazzone. Under the facts here, it was apparent that Mazzone was inciting or soliciting Meyer to solicit him. There should be no criminality attributed to this, where it infringes on the First Amendment.

In the case before the Court, Mazzone was at most solicited to solicit others to commit murder. Had Mazzone solicited others he purportedly knew to commit murder, but failed in those solicitations, he would have been chargeable, despite that failure and in some respects because of it, with the common law misdemeanor of solicitation. The Petitioner on the other hand would have solicited a solicitation. But inasmuch as the crime of solicitation in Maryland is limited to instances where the object of the solicitation is the commission of a felony, *Lamb vs. State,* 67 Md. 524 (1887), *Cherry vs. State,* 18 Md. App. 252 (1973), Petitioner cannot be charged for soliciting another to solicit.

There is uncertainty concerning whether the law of Maryland presently requires that the object of a solicitation be the commission of a felony. Although each prior instance where the issue has been considered at the appellate level indicates that in order to give rise to an indic-

table solicitation the solicited criminal offense must be a felony, the Court of Special Appeals was not persuaded. It dismissed the earliest statement of the felony requirement, *Lamb vs. State,* supra, as "vintage" and the most recent, *Cherry vs. State* supra, as "obiter dicta," "not necessary to the decision."

It is extremely important to a fair evaluation of the facts and issues of this case that it be conducted in the certainty of what kind of criminal offense is required as the object of a solicitation in order to give rise to the indictable common law misdemeanor of solicitation. Larger than the instant case, it is a public necessity that there be certainty about the underlying requirements for common law solicitation to protect the liberty interests of those who are charged or will be charged with the offense. It is fundamental to a nation governed by law that that law be express and clear, especially where the violation of the law arouses the police powers of the State and places at risk the life and liberty of the party to be charged.

II

In reviewing the elements of the common law misdemeanor of solicitation, this Court in *Cherry v. State,* supra, stated that the act forbidden consists of the accused person's parole or written efforts to activate another to commit a criminal offense. Solicitation is an act and the gist of this offense is incitement. No proof of an act toward the commission of the intended felony is required, as would be for a conviction of the crime of attempt or conspiracy, since the crime of solicitation is complete upon proof of the act of incitement by the defendant to another to commit what is required in Maryland to be a felony.

What the State has done in the instant case is to divide a single offense into four offenses and persuade the Court to impose four punishments for one and the same act. By analogy, it is as though in a larceny involving several articles of property, the thief was prosecuted in separate counts for each individual article. Again, it is analogous to a situation where several forged instruments are uttered at the same time and by the same act and convictions are obtained and consecutive sentences imposed for each instrument uttered.

The Supreme Court in *Braverman v. United States,* 317 U.S. 49 (1942) considered whether convictions on several counts each charging conspiracy to violate a different provision of the Internal Revenue Laws, where the verdict was supported by evidence of a single conspiracy, justified the imposition of two year sentences on each count. There the maximum penalty for a single violation of the conspiracy statute was two years imprisonment.

The Court stated that the gist of the crime of conspiracy is the agreement of the conspirators to commit one or more unlawful acts where one or more of such parties do any act to effect the object of the conspiracy. In reversing the lower court, the Court in *Braverman* rejected the government's position that the conspirators, though party to a single agreement, were guilty of as many offenses as the agreement had criminal objects. For the Court, the key factor was the nature of the crime of conspiracy as an agreement of the conspirators to commit one or more unlawful acts. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute (reflecting the common law) punishes. In so holding, the Court struck down the sentence of the trial court of consecutive two year sentences. See also *Short v. United States* (C.C.A. 4th) 91 F.2d 614, 112 A.L.R. 969 and 15 Am.Jur. "Criminal Law" Sec. 382.

In this case, the gist of the offense is the incitement. The incitement extended during two separate conversations, on May 8, 1978 and on May 15, 1978, the bifurcation necessitated by Mazzone's cutting off the first conversation and arranging for a continuation a week later. The "required evidence" test generally used in dealing with multiple punishment results is difficult to apply to a solicitation charge, because the State can slant the test by alleging different combinations of participants, dates and methods for essentially the same solicitation activity. See *Barlett v. United States,* 166 F.2d 928, *Feriacane v. United States,* 29 F.2d 691, 692 (7th Cir. 1928); 24 Minn L. Rev. 522; 621 Columbia L. Rev. p. 995 (1961). For example, the State could have increased the four counts in order to seek seven convictions and seven consecutive twenty year sentences by adding a separate count for each victim named in each conversation.

Separate counts and separate punishments would only be justifiable in this case if the Appellant had solicited other persons beside Mazzone to commit the felony of murder. To convict of the crime of solicitation, the State need only prove through the words used by the Appellant that the intended crime was a felony. It need not show the identity of the intended victim of the felony. Indeed, if one solicited another to commit a felony which did not involve third persons or involved unknown and unnumbered third persons, regardless of the absence or unknown identity/number of third persons involved, it is the underlying felony sine qua non that supports the solicitation charge. For this reason, the traditional required evidence test does not justify separate counts and separate consecutive punishments under the circumstances of this case. To accept the State's position, as was done by the trial judge, that separate consecutive punishments could be imposed based on the identity of the intended victims of the

solicited felony would lead to absurd result, e.g. where the evidence established at that a defendant had solicited another to destroy a city, consecutive twenty year sentences could be imposed for each person in the city.

As the Court of Special Appeals noted, there is nearly complete uncertainty as to whether a solicitation "to kill more than one person constitutes distinct incitements and thus permits conviction and punishment for more than one act of criminal solicitation". It is "truly virgin territory", a legal issue of first impression in the State and in need of clarification from this Court. (The question presented for review to the Court of Special Appeals by petitioner phrased its inquiry in terms of the imposition of sentences. The Court of Special Appeals correctly reframed the question as a consideration of the multiple convictions that underlaid the sentences imposed).

The Court of Special Appeals in its analysis of multiple solicitation ostensibly focused upon the number of incitements. It eschewed a number of victims test except in so far as that number "may be evidence of the number of incitements". Yet the example offered to distinguish the number of victims from the number of incitements as a means of differentiating multiple from singular solicitations, specifically that "an entreaty made by a solicitor to blow up a building in the hope that two or more particular persons may be killed in the blast could be characterized as one solicitation", highlights the ambiguity of the lower opinion. The example demonstrates that the proposed test focuses not upon incitements but upon the events incited. According to the rationale of this test if the crime (or crimes) solicited required one pull of the trigger, then but one solicitation occurred no matter how many victims. Or if a condition were placed upon the crimes being solicited that they must occur in one place and at the same time and

at one offender's direction and by use of a single method, then similarly but a single solicitation occurred. Whereas if one solicited another to kill a third party but chose to pursue that ultimate end by requiring the use of a series of methods that for any attempt were not certain to but would eventually, by force of repetition and increased odds, succeed, then multiple solicitation occurred, one for each event that might have succeeded.

Here we have a prisoner with limited funds directly available to him and a remote prospect of collecting the proceeds of an insurance policy written on his wife's life. His first conversation with Mazzone focuses upon the murder of his wife to vent the anger and vengeance he feels for her because she failed to testify on his behalf. He is led to believe that the killing can be done. He adds the names of two police officers. In the second conversation, deluded both as the likelihood of a retrial of his murder charges and of the prospects of successfully killing people who oppose him, Lewis is added to the list, as the Court of Special Appeals noted, "almost an afterthought". Given the petitioner's state of mind at the time, it is not unlikely that further victims could have been elicited from him. Petitioner was listing the names of persons against whom he bore a grudge and pledging money he did not have to effect their murder. Yet because he is listing individual victims, he is supposed to be guilty of multiple solicitations. But if he had sought the complete destruction of a building, e.g. a court house, at such a time to effect the killing of the listed victims, along with countless other innocent victims, according to the Court of Special Appeals he would be chargeable with a single count of solicitation.

It is clear from transcripts of the conversation that Meyer did not care how the killings were undertaken; his only concern was the result. In addition to Meyer's ex-

pressed lack of interest in methods, the special nature of his relationship with Mazzone limited his involvement. The Petitioner was soliciting another to arrange for the murder of several third persons. But the solicitation itself was directed to one person. It was a single solicitation, conducted at two separate meetings, that another arrange for the murder of enumerated victims. It is contrary to logic and public policy to classify Meyer's incitement of Mazzone as a single or multiple solicitation on the basis of whether distinct events or a single event was countenanced. The gist of the offense of solicitation is incitement and Meyer made a single attempt to solicit Mazzone to undertake a multiple killing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of March, 1981, I mailed, postage prepaid, a copy of the aforegoing *Petition for Writ of Certiorari* to F. Ford Loker, Assistant Attorney General, One South Calvert Building, Baltimore, Maryland 21202, attorney for Appellee.

/s/ John T. Bell
JOHN T. BELL

APPENDIX C

REPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 699

September Term, 1980

GENE THOMAS MEYER

v.

STATE OF MARYLAND

Thompson Wilner Couch, JJ.

Opinion by Wilner, J.

Filed: February 6, 1981

On April 26, 1978, a jury in the Circuit Court for Prince George's County found appellant guilty of the first degree murder of Carol Lewis and the second degree murder of Heather Lewis. The victims were, respectively, the wife and infant daughter of one Lon Alec Lewis; and it was alleged that the murders were committed pursuant to an agreement with Mr. Lewis – that they were, in colloquial terms, "contract murders." Appellant ultimately was sentenced to consecutive terms of life and thirty years imprisonment for those crimes, and the convictions were af-

firmed on appeal. *See Meyer v. State*, 43 Md. App. 427 (1979), *cert. den.* 286 Md. 750, *cert. den.* ____ U.S. ____, 64 L.Ed.2d 792 (1980). Lewis was also tried and convicted for his complicity. *See Lewis v. State*, 285 Md. 705 (1979).

Appellant was not sentenced on April 26. The court deferred sentencing pending (possibly among other things) receipt of a presentence investigation report; and appellant was lodged at the Prince George's County Detention Center during the interim.

While at the Center awaiting sentencing, appellant attempted to set in motion a plan for four more killings. Specifically, according to the record before us, he sought to arrange for the killing of his wife, Mr. Lewis, and two police officers who had investigated the Lewis killings and succeeded in extracting a confession from him (Detectives Hatfield and Morrissette). Fortunately for the intended victims, but unfortunately for appellant, the person he solicited to carry out or arrange for these executions was an undercover State policeman, Frank Mazzone, who recorded the two conversations he had with appellant pertaining to this scheme.

By reason of these activities, appellant was charged with four counts of solicitation of murder – one count for each intended victim. He was convicted on all four counts, given four consecutive sentences of twenty years each (consecutive to the life plus thirty already being served), and now appeals. He claims:

> "1. The Trial Judge Erred In Denying Appellant's Motion For Judgment Of Acquittal Where the Evidence Indicated That The Appellant Solicited Mazzone Not To Murder The Intended Victim As Charged But Rather To Solicit Others To Carry Out The Intended

Murder And In Instructing The Jury That The Appellant Should Be Found Guilty If It Was Proven That He Solited Mazzone To Have The Murders Committed.

2. The Trial Judge Erred In Imposing Four (4) Consecutive Twenty (20) Year Sentences Upon The Appellant Where The Criminal Act Of The Appellant Was One Continuous Series of Conversations Wherein He Made The Solicitation.

3. The Trial Judge Erred in Denying Appellant's Motion To Suppress The Tapes Recording The Conversations Between Himself And Mazzone Where The Statements Of The Appellant Were Obtained By The Police In Violation Of Appellant's Constitutional Right To Counsel."

We find no merit in any of these contentions.

Appellant's initial contact with regard to his plan was with Joseph Walker, a co-inmate at the Detention Center. He asked whether Walker knew "anyone who did contract killings or hits." Walker responded in the affirmative, whereupon, according to Walker, appellant "asked me if I could arrange for a killing." He did not tell Walker who the victim or victims were to be. Walker passed this information on to a Prince George's County policeman, for whom he had served as an informant. With the concurrence of the State's Attorney's Office, it was arranged for Captain Mazzone, of the State Police, to play the role of Vince Rinaldo, an agent for two "hit men" and, wearing a secret transmitter, to meet with appellant at the Detention Center and find out more about what he had in mind.

Two meetings took place, and in both instances the conversation was recorded and transcribed. At the first meeting, on May 8, 1978, appellant very clearly importuned Mazzone to kill, or to arrange for others to kill, appellant's wife. At the second conversation, on May 15, 1978, there was further discussion about the liquidation of the wife and additional importunings of Mazzone to kill, or to arrange for others to kill, the two police officers and Lon Alec Lewis.

The conversations tended to ramble a bit, but what essentially came through was this:

(1) As to the wife, appellant explained that he was upset with her because she failed to testify in his behalf. She was then living in Puerto Rico, and, in order to facilitate the execution, appellant told Mazzone in some detail what her living arrangements were. He described his wife's appearance and also made arrangements for Mazzone to obtain a picture of her from appellant's apartment.

(2) There was a great deal of discussion about the fee for murdering the wife, the parties finally agreeing on $40,000. Appellant promised a deposit of $1,000 "up front," to be taken from an existing bank account in Minnesota, with the balance to be paid from the proceeds of a $100,000 insurance policy on the wife's life.[1] Indeed, as that policy was about to lapse because of nonpayment of premiums, appellant insisted that the killing take place before May 15. He told Mazzone that he didn't care what method was used, but would leave that up to the actual executioner. Appellant did, in fact, later procure a $1,000 money order payable to Vince Rinaldo which he caused to be sent to Mazzone.

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[1] Because the policy had a "double indemnity" provision, appellant assumed that he would receive $200,000 upon his wife's demise.

(3) The scheme to kill the two officers and Lewis came up in the second conversation, which was initially prompted by the fact that Mazzone had not yet received the $1,000 deposit. After some discussion about that and some further conversation about the execution of the wife, appellant broached the subject of killing the two officers. He told Mazzone that he didn't want them around as witnesses in the event of a second trial.[2] There was no rush about doing away with the officers; as appellant put it, "I suppose anytime, they say a year before the appeal, so anytime within the next year, so its [sic] not really pushing it."

Notwithstanding the permissible delay in implementation, appellant and Mazzone did arrive at a definite agreement as to their ultimate disposition. Appellant gave Mazzone the names of the officers and told him where they worked. They agreed on a fee of $80,000 for the two officers, over and above the $40,000 for the wife.

(4) Lewis was almost an afterthought. Near the end of the second conversation, appellant indicated a desire to be rid of him as well. This part of the conversation is most relevant:

"FRANK (MAZZONE): All right, what do you want to do with him?

GENE (APPELLANT): Um, same thing with Hatfield or Morrisette [the two officers] if that's . . . .

[2] Appellant seemed optimistic that his convictions would be overturned on appeal and was looking ahead to the likelihood of a retrial.

FRANK:	Is he on the street right now
GENE:	No, he's up here – second floor
FRANK:	Does he know your [*sic*, you're] here?
GENE:	Disappears or if he dies, people collect _____ people ask too many question here.
FRANK:	You, you do want him dead, or you don't.
GENE:	I do."

Ultimately, it was agreed that Mazzone should wait until Lewis was transferred from the Detention Center to the State prision where the killing would be easier to accomplish.[3] Appellant promised an additional fee of $9,000 for Lewis.

Walker had told appellant that Mazzone was a "legal representative of . . . two professional hitmen." Mazzone never represented himself as a lawyer, and in fact never made clear to appellant what his supposed relationship was with whomever was to commit the murders. Indeed, there is nothing in the transcript of the conversations to foreclose the possibility that Mazzone himself would be the actual "hitman." Throughout the conversations, when referring to the killings, Mazzone used the plural pronoun "we" – "Then *we* do the job," "if *we* got to go to Puerto

[3] At the time, Lewis was either awaiting trial or he had already been tried and was awaiting sentence. *See Lewis v. State, supra*, 285 Md. 705.

Rico . . .," "what do you want to show that *we* did the job? *We* bring you something back?" "*we* got a standard way *we* do things." By way of contrast, when referring to things he individually would do, such as retrieve the picture of appellant's wife from his apartment, Mazzone used the singular pronoun, "I." In short, although he said nothing directly to dispel any notion that he was merely an agent for others, Mazzone, in his own conversations with appellant, clearly portrayed himself as an integral part of a group willing to carry out contract murders, without indicating who would actually "do the job."[4]

With this background, we may dispose of appellant's complaints.

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[4]In his trial testimony, Mazzone expressly denied representing himself as an attorney. This colloquy, on cross-examination, is illustrative:

> "Q. Did you in your activities and conversations with Meyer lead him to believe that you were in fact an attorney?
>
> A. Well, I guess I can't really say what he believed but I led him to believe that I would commit a murder for him. If he felt that I was an attorney, I couldn't say.
>
> Q. That you would commit a murder or that you would get someone to commit a murder?
>
> A. Well, again, I guess I don't know what he was thinking, but probably that I would do it or I would have someone to do it. I don't know which way he was taking it.
>
> Q. You do not know which way he was taking it?
>
> A. No, sir.
>
> Q. Well, you did note on your prior testimony then that you would appear for him to other people as an attorney to seek their services?
>
> A. I never said anything about being an attorney to Mr. Meyer."

(1)

Appellant's first challenge, both as to the sufficiency of the evidence and the jury instructions, rests upon the premise that Mazzone was acting solely as an agent for others rather than as the "hitman" himself, and that his entreaties to Mazzone were made upon that understanding. His argument is a technical one, proceeding from this syllogism: (i) In Maryland, the common law crime of solicitation requires as its object the commission of a felony; (ii) the evidence here establishes at best (or worst) an importuning of Mazzone to enter into a conspiracy to have other persons commit the murders and not to commit the murders himself; (iii) the entering into a conspiracy in Maryland is a misdemeanor; (iv) *ergo*, as the sole object of his entreaties to Mazzone was the commission of a misdemeanor, he cannot be adjudged guilty of common law solicitation.

We need not examine in any detail the correctness of appellant's asserted legal propositions because his factual predicate for them is incorrect.[5] For one thing, Mazzone's testimony and the transcript of the conversations with ap-

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[5] Appellant's first premise – that to constitute common law criminal solicitation the object of the entreaty must be the commission of a felony – is based upon *obiter dicta* used in *Cherry v. State*, 18 Md.App. 252, 259 (1973). *Cherry* involved a prosecution under a *statutory* solicitation charge – Md. Ann. Code art. 27, § 15(e), prohibiting the procuring or soliciting for purposes of prostitution, lewdness or assignation – and therefore did not directly involve the more general common law offense. Cherry argued that the statute was unconstitutional under the First Amendment in that it abridged his freedom of communication. In addressing that issue, the Court described the general nature and history of solicitation offenses, and it was in that context that we viewed the vintage case of *Lamb v. State*, 67 Md. 524 (1887), as requiring that the object of the solicitation be the commission of a felony. Such an interpretation was not necessary to the decision in *Cherry*.

pellant permit a fair and reasonable inference that Mazzone/Rinaldo was negotiating as a potential "hitman" himself or as one who would not only arrange the killings but be present at the scene of their commission. Even accepting appellant's view that Mazzone was merely an agent not intending to commit the murders (or be present at their commission), he nevertheless would clearly have been an accessory before the fact had the murders actually been committed by his "clients." At the very least, Mazzone/Rinaldo's role was to aid, counsel, command, or encourage the commission of the killings. In either case, whether his role was that of actual participant or accessory before the fact, he would have been culpable as a principal had the murders been committed by reason of his efforts. *See State v. Ward,* 284 Md. 189 (1978).

It is clear, therefore, that the object of appellant's solicitation was for Mazzone to commit murder, a felony; and thus, even under the *Cherry dicta,* the evidence sufficed to establish the crime of criminal solicitation.

(2)

Appellant next asserts, in a somewhat confused fashion, that the imposition of four consecutive sentences was inappropriate since, at best (or worst) only one criminal solicitation was involved. The object or thrust of his argument is clear – he seeks to vacate at least three of the sentences – but the argument itself is ambiguous in terms of both the precise nature of the complaint and the legal theory offered in support of it.

The contention is initially framed in his brief, and was expounded at oral argument, as an attack only upon the multiple sentences and not upon the underlying multiple convictions. Yet the basis of his complaint is the assertion

that only one criminal act occurred, which, if true, would impact as much, if not more, upon the validity of the several convictions as upon the sentences imposed on them. In laying out his theory, he weaves back and forth between the argument that only one incitement took place and the contention that the doctrine of merger, as laid down in *Newton v. State*, 280 Md. 260 (1977), is applicable, which presupposes the existence of separate crimes that, under common law, or Constitutional double jeopardy strictures, have to be merged one into the other.

In order to address the issue, we first have to define it. Ordinarily, if an appellant limits his attack to the sentence, we will not consider any non-jurisdictional defect in the underlying conviction. Maryland Rule 1085. Here, however, given the nature of appellant's complaint, it would be impossible for us to consider his objection solely in the context of the multiple sentences; it so obviously relates to the multiple convictions as well that we must, of necessity, consider and resolve the broader question of whether it was proper to charge, convict, and sentence appellant on four separate counts of solicitation upon the evidence in this case. Consecutive sentences are permissible only for distinct violations of law. *Kaylor v. State*, 285 Md. 66 (1979).

Having set the question for review, we turn to the legal issue which, as we have observed, is also a bit muddled. Appellant's most elemental position is that the gist of a criminal solicitation is the incitement, and that the evidence here established but one such incitement, notwithstanding that multiple victims were involved. He draws an analogy in this regard to the crime of conspiracy, the gist of which is the unlawful agreement among the conspirators; and, pointing to cases such as *Braverman v. United States*, 317 U.S. 49 (1942), he argues that a single

agreement to commit more than one unlawful act is still but one conspiracy for which but one punishment may be imposed. The same rule, he claims, applies to a criminal solicitation.

This does seem to be the real issue here – not whether there are separate crimes that should be merged, but whether there were, in the first place, separate crimes established by the evidence. If, assuming arguendo the validity of appellant's analogy to the crime of conspiracy, the evidence showed only one act of incitement, there would arise only one act of criminal solicitation and thus nothing to merge. if; on the other hand, the evidence sufficed to establish separate and distinct acts of incitement, there would arise several acts of solicitation, and they would not be mergable under the concepts enunciated in *Newton, supra.* Each solicitation would stand entirely on its own under the "required evidence" or any other cognizable test. The issue, then, is not one of merger, but of evidentiary sufficiency in light of the nature of the crime of criminal solicitation.

We are, to some extent, in truly virgin territory. We have been neither directed to nor able to locate any reported decision in the United States or in the common law nations of the British Commonwealth precisely on point – determining whether an entreaty to kill more than one person constitutes distinct incitements and thus permits conviction and punishment for more than one act of criminal solicitation. *Compare State v. Furr,* 235 S.E.2d 193 (N.C. 1977), *cert. den.*434 U.S. 924, in which the issue was mentioned but not decided, and *see also Regina v. Most,* 7 Q.B.D. 244 (1881), involving a converse situation – a solicitation placed in a newspaper (*i.e.,* a solicitation of many people to perform one act).

We start with the nature of the crime itself. As we pointed out in *Cherry v. State, supra,* quoting from Clark and Marshall, *Law of Crimes* 7th Ed., 1967), the forbidden act in a criminal solicitation is "the accused person's parol or written efforts to activate another to commit a criminal offense." 18 Md.App. at 258. *See also In Re Appeal No. 180, Sept. Term 1976,* 278 Md. 443 (1976). We see no reason why, on the one hand, in a single conversation (much less in two separate conversations as occurred here), a person cannot make successive and distinct incitements, each having a separate object; and we therefore reject the notion that merely because there is but one solicitor, one solicitee, and one conversation, only one solicitation can arise. We similarly reject, however, as being equally simplistic, the "per capita" theory that there are necessarily as many solicitations as there are victims.

Accepting the analogy (although not precisely appellant's interpretation of it) to the allied crime of conspiracy and to the view of it set forth in *Braverman v. United States, supra,* the question of whether there is but one solicitation or several depends upon the circumstances. What, in other words, is the solicitor asking the solicitee to do?

Braverman involved a collaboration among several people, extending over a continuing period of time, to unlawfully manufacture, transport, and distribute distilled spirits. Their agreement was to carry on that activity. It so happened that that activity contravened a number of different Federal tax laws, and the conspirators were charged, convicted, and sentenced for multiple conspiracies, one for each specific statute violated. The Court reversed, holding, in effect, that if there is a single agreement, there can be but one conspiracy, even if the overt acts done pursuant to it violate several laws. "The single agreement,"

said the Court at p. 54 of 317 U.S., "is the prohibited conspiracy, and however diverse its objects it violates but a single statute . . . ."

Braverman, of course, but begs the question here. At best, it reinforces the requirement that we focus on the number of incitements and not solely on the number of victims. The number of victims is important only as it may be evidence of the number of incitements. By way of example, an entreaty made by a solicitor to blow up a building in the hope that two or more particular persons may be killed in the blast could be characterized as one solicitation, notwithstanding that implementation of the scheme might violate several different laws or, because of multiple victims, constitute separate violations of the same law. The multiple criminality of the implementation would not, in that instance, pluralize the incitement, which was singular. That is the thrust of *Braverman*. But that is quite different from the situation in which the solicitee is being importuned directly to commit separate and distinct acts of murder — to kill, individually, several different specified victims — possibly at different times and places and by different means and executioners. In the latter case, there is not a single incitement but multiple ones, each punishable on its own.

That is the framework within which we must judge this case; and, from the record before us, we find the evidence sufficient to show four separate criminal solicitations based upon four distinct incitements. In point of time, at least three of the incitements were clearly distinct. The deal for the wife was made on May 8; that for Lewis and the two officers was made a week later but in different parts of the conversation. The executions were to occur at different times and places, and possibly by different means and executioners; different (and cumulative) fees were to be paid

for these acts. Different motives were involved. Even as between the two officers, the evidence permitted a fair inference that most of these distinguishing attributes were present. In short, the evidence sufficed to permit a finding that it was not a "lump sum" singular deal, but separate and independent incitements to commit four separate and distinct acts of murder against specific named individuals; and thus, neither the separate convictions nor the separate and consecutive sentences were inappropriate.[6]

(3)

Appellant's last challenge is to the admissibility of the tape recordings made by Mazzone. He asserts that *Massiah v. United States,* 377 U.S. 201 (1964), prevents the admission into evidence of any conversations between a prisoner and an agent of the State.

This Fifth and Sixth Amendment claim is totally without merit. *Massiah,* and its descendants *Brewer v. Williams,* 430 U.S. 387 (1977), and *United States v. Henry,* ____ U.S. ____, 100 S.Ct. 2183 (1980), involved attempts by the government to gain incriminating evidence from the mouth of an accused with respect to crimes with which he was then charged and upon which he had not been tried. The object, in other words, was to enhance the prosecution already commenced against the accused. This of course, was not the situation here. In the first place, there were no charges then pending against appellant; he had already been found guilty and was merely awaiting sentence. Moreover, Mazzone was very careful to avoid getting into any discussion pertaining to those offenses, and the record does not reveal that the tapes had any effect

[6]Appellant has not challenged the validity of the sentences by reason of their length, and we therefore do not consider that matter.

whatever on them. Appellant asked a friend to arrange a conversation with a "hitman" for the purpose of committing new crimes, and it was his bad luck that his friend informed the police.

There is no protection afforded under *Massiah* to plans initiated by the appellant for the commission of future crimes. The tapes were properly admitted into evidence.

JUDGMENTS AFFIRMED;
APPELLANT TO PAY THE COSTS.

GENE THOMAS MEYER

v.

STATE OF MARYLAND

In the Court of Appeals of Maryland

Petition Docket No. 41
September Term, 1981
(No. 699, September Term, 1980
Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition, be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: May 27, 1981.